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March 17, 2010

BY E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
MAR 17 2010
Part of
Public Record

Re: STB Docket No. 42117, *Cargill, Inc., et al. v. Aberdeen & Rockfish Railroad Co., et al.*

Dear Ms. Brown:

Attached for E-filing in the above-referenced docket is the AAR Defendants' Reply to Complainants' Motion to Stay Proceeding Against Class II and Class III Rail Carriers.

Thank you for your attention to this matter.

Sincerely,

/s/ Michael L. Rosenthal

Michael L. Rosenthal
*Counsel for Association of
American Railroads and
Railinc, Corp.*

cc: Jeffrey O. Moreno, Esq. (counsel for Complainants)

BEFORE THE
SURFACE TRANSPORTATION BOARD

CARGILL, INC., *et al.*,

Complainants,

v.

ABERDEEN & ROCKFISH RAILROAD
COMPANY, *et al.*,

Defendants.

Docket No. 42117

**THE AAR DEFENDANTS' REPLY TO COMPLAINANTS' MOTION
TO STAY PROCEEDING AGAINST CLASS II AND CLASS III RAIL CARRIERS**

On March 16, 2010, Complainants filed a Motion to Stay, essentially to allow the proceeding to go forward "without imposing a disproportionate burden and cost upon the Class II and III rail carriers relative to their stake in the case." (Motion, p. 2) The AAR Defendants¹ similarly desire that those railroad defendants that have minimal or no amounts at stake in the outcome should be relieved of the costs and burdens associated with this proceeding to the maximum extent possible without adversely affecting the rights of the AAR, Railinc, or any other railroad defendant.

While the AAR Defendants therefore have no objection to Complainants staying their actions against certain railroads in the proceeding, the AAR Defendants do object to

¹ The AAR Defendants are: Association of American Railroads; Railinc, Corp.; BNSF Railway Co.; Canadian National Railway Co.; Canadian Pacific Railway Co.; CSX Transportation, Inc.; Gary Railway Co.; Elgin, Joliet & Eastern Railway Co.; Norfolk Southern Railway Co.; The Baltimore and Ohio Chicago Terminal Railroad Co.; The Kansas City Southern Railway Co.; and Union Pacific Railroad Co.

Complainants' Motion to the extent that it potentially adversely affects the rights of the AAR, Railinc, and the remaining railroad defendants to which the stay does not apply.²

As Complainants recognized by naming Class II and Class III carriers in their Complaint, and by proposing an arrangement under which carriers subject to the stay nonetheless agree to be bound by the Board's decisions, Complainants have raised issues that involve the activities of more than just AAR, Railinc, and Class I carriers. Mileage equalization charges are calculated based on miles that are aggregated across all rail carriers participating in Freight Tariff RIC 6007-Series. Consequently, the AAR Defendants' efforts to understand the facts that motivated the Complaint and their implications for the relief requested by Complainants may require Class II and Class III carriers to participate in discovery and other aspects of this case.

In that regard, several Class II and Class III railroads potentially have a significant financial stake in the proceeding. AAR data show that payments for excess miles to individual Class II and Class III rail carriers for car movements in 2007 and 2008 ranged up to over \$1 million, which exceeds the payments made to some of the Class I rail carrier defendants.

If Complainants wish to forego certain of their own rights with respect to Class II and Class III carrier defendants that is their choice to make, but that choice should not prejudice the AAR Defendants. For example, it is too soon to know whether the AAR Defendants will see a need to conduct discovery against any Class II or Class III carrier, but if they do, they should be able to proceed under the Board's rules, which do not require prior Board approval (*see* 49 C.F.R. § 1114.21(c)); they should not have to make a special showing to convince the Board to revoke the stay, as Complainants propose (*see* Motion at 3, Term No. 3). Moreover,

² The AAR Defendants do not object to Complainants' request for an extension of time for the Class II and Class III rail carrier defendants to file their answers. *See* Motion at 2 n.2.

Complainants' proposal is one-sided in that a Class II or Class III carrier would not need Board permission to participate in the proceeding after initially agreeing to the stay; it could simply revoke its Undertaking. *See* Motion at 3, Term No. 4. Complainants' proposal also creates the possibility that, even if a carrier revokes its Undertaking, the AAR Defendants' ability to require the carrier to participate in the proceeding could be restricted if the Board were to conclude that the carrier's participation would be prejudicial to another party. *See id.* The worthy objective of minimizing the burdens of this litigation on certain rail carriers can, and should, be accomplished without potentially prejudicing the rights of the AAR Defendants.

Accordingly, the AAR Defendants request that the Board condition any stay on the stipulation that it affects only the rights of Complainants and consenting Class II and Class III carriers, but does not, in any way, restrict or otherwise prejudice the AAR Defendants' abilities that they would have absent such a stay to protect their own rights and interests in this proceeding through seeking discovery or taking any other action that would require participation by defendants subject to the stay, without any need for special Board approval or authorization as a result of the stay.

CONCLUSION

The AAR Defendants have no desire to impose unnecessary costs on rail carrier defendants, and they have no objection if Complainants want to agree to forego their own right to require any carriers they choose to participate in this case. However, the Board should make clear that the terms of any stay agreement between Complainants and those carriers has no effect on the AAR Defendants and does not, in any way, restrict or otherwise prejudice the AAR Defendants' abilities to protect their own rights and interests in this proceeding.

Respectfully submitted.

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March 17, 2010

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that, on this 17th day of March, 2010, I caused a copy of the AAR Defendants' Reply to Complainants' Motion to Stay Proceeding Against Class II and Class III Rail Carriers to be served by first class mail, postage prepaid, on all parties of record in Docket No. 42117.

/s/ Michael L. Rosenthal

Michael L. Rosenthal